IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 377

PRECISION INSTRUMENT MANUFACTURING COMPANY, KENNETH R. LARSON, AND SNAP-ON TOOLS CORPORATION,

Petitioners,

vs.

AUTOMOTIVE MAINTENANCE MACHINERY COMPANY,

Respondent.

REPLY TO RESPONDENT'S BRIEF.

WILL FREEMAN,
CASPER W. OOMS,
Attorneys for Petitioners.

THE DUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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REPLY TO RESPONDENT'S BRIEF.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Case Is One of Public Interest.

Respondent first challenges the Petition in this cause on the ground that it involves "nothing whatever of public interest." This Court has twice within the last term pointed out that patent causes are of public interest:

> "It is the public interest which is dominant in the patent system."
>
> *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661, 665.

> "There are issues of great moment to the public in a patent suit."
>
> *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 323 U. S. ..... ; 61 USPQ 241.

The Question of the Duty to Report Knowledge of a Felony Is Also One of Public Interest.

The Petition also raises the question of the duty imposed upon counsel who learn of perjury in a contested matter to disclose that knowledge to the authorities under Criminal Code, sec. 146 (Title 18, U. S. Code Sec. 251), a statute never construed by this Court.

Certainly the administration of law and the policy expressed in the statutes of the United States are matters of public interest. The power of a chancellor to implement that policy by denial of relief for unclean hands is an important judicial weapon.

As said by Mr. Justice Roberts in *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 323 U. S. ....., 61 USPQ 241, "No fraud is more odious than an attempt to subvert the administration of justice."

Plaintiff Did Procure the Larson Patent and Contract with Knowledge of Larson's Perjury and Did Thereafter Fail to Disclose That Knowledge.

It is further certainly a matter of deep public interest that the patent presented to the chancellor for enforcement was procured in the settlement of a patent interference in which the patentee attempted to establish his priority as to the interference counts by perjured proofs—a settlement for which there was no occasion except for Respondent's discovery of that perjury.

The District Court found specifically that had Larson's proofs been true he would have established his priority by two or three years. (Finding 10, R. 1124.)

The District Court also found that the insufficiency of these proofs was known to Respondent's attorneys at the

date of the settlement of the interference. (Finding 11, R. 1124.)

Respondent quibbles about the word "insufficient." The only ground on which the proofs were ever questioned or attacked was their falsity.

When Respondent's attorney by letter assailed the attorney who had taken Larson's interference proofs, a day or two before the settlement was effected, he did so only on the ground of falsity of the proofs, stating, "that a large part of the testimony taken on behalf of Snap-On and Larson is, to put it mildly, not the whole truth." (R. 1049.) Those words could only have been written by an attorney who had satisfied himself that the testimony he was discussing was false.

Furthermore, Finding 16 (R. 1125) which must be read with the other findings, finds flatly that Respondent and its attorneys failed to inform the proper officials **"of the perjury"** in the interference proceedings, a fact that clearly implies knowledge on their part of the perjury.

Respondent (Brief, p. 12) attempts to explain the settlement on the suggestion that "There was therefore a serious question of abandonment • • • and his (Larson's) proofs could have been 'insufficient' for that reason." If there was any such question it was snugly harbored in Respondent's counsel's mind, as it was never asserted against Larson and not mentioned in the negotiations for settlement or recited in the settlement agreement.

Even the Circuit Court of Appeals found that prior to the time perjury was pleaded as a defense in the case "plaintiff and its attorneys, of course, were morally certain that Thomasma's story was true, • • •." (R. 1220-1221.) The facts upon which this moral certainty was built were all before plaintiff and its attorneys when the inter-

ference settlement was effected, and were the facts which led to the settlement.

Plaintiff and its attorneys were willing to, and did, accept the benefit of those facts as a basis for demanding the application for the Larson patent in suit and the settlement contract, but they were unwilling to accept the burden of knowledge of perjury, when, in the absence of perjury there was no occasion for the settlement.

The Circuit Court of Appeals found that "under these circumstances we think it is clear that no duty devolved upon plaintiff to report its information to either the District Attorney or the Patent Office." (R. 1221.) Certainly if plaintiff and its attorneys were sufficiently morally certain of the falsity of Larson's proofs to force him out of the interference on that ground, they were possessed of sufficient knowledge to be subject to the statutory duty to inform the authorities "**of the perjury.**"

It was this willingness of plaintiff and its attorneys to employ their knowledge of Larson's perjury to procure the Larson patent application and the contract sued upon, and their unwillingness to disclose that knowledge to the authorities, that led the District Court to deny relief when the properties so acquired were brought into court for protection.

The Observation by the District Court That "Hobbs Did Not Testify Falsely" Did Not Impose On the Circuit Court of Appeals the "Duty to Disregard All Other Evidence Which Cannot Be Reconciled Therewith."

Respondent's brief complains that Petitioners do not unquestioningly accept the version of the facts employed by the Circuit Court of Appeals in its opinion, and repeatedly urges issues of the credibility of the respective witnesses in the case. (Brief, pages 4, 5, 8, 10, 15.) The

question of credibility of witnesses was for the District Court, and other than specific findings that the evidence was in irreconcilable conflict, the District Court made no findings with respect to the credibility of witnesses.

The Memorandum of the District Court stated that "the witness Hobbs did not testify falsely" (R. 1126) and from this the Circuit Court of Appeals read a command to **disregard** all other evidence which could not be reconciled with the testimony of Hobbs.

A witness may be wholly innocent of false testimony, and yet testify so inaccurately, so mistakenly, or with such poor recollection, that his testimony is wholly irreconcilable with that of other witnesses. The testimony of such other witnesses is not therefore to be rejected.

For example, in this case the witness Hobbs testified that he did not recall making a statement to petitioners' attorneys at a meeting two weeks before the trial, "Of course, we were all operating on the basis that there was perjury." (R. 627.) Such a failure of recollection as well as inaccurate or mistaken recollection would still leave the witness free of a charge of having testified falsely. It would not however rebut the evidence of other witnesses or subject a court to the "duty to disregard all other evidence" which could not be reconciled therewith.

The Observation Respecting Hobbs in the Supplemental Memorandum Was Not a Special Finding.

The Respondent has again indulged in the type of misrepresentation designed to confuse the issues. The Respondent refers to the Supplemental Memorandum of the District Court as a "special finding" and has endeavored to create the inference that the District Court was thereby passing on the credibility of the witnesses and finding that Hobbs "had told the truth." Any attorney present at the

hearings before the District Court could not conscientiously make any such statement.

This misrepresentation of the purpose of the rendition of the Supplemental Memorandum requires that we attach as an appendix hereto the transcript of the hearing before Judge Igoe on June 25, 1943 involving the settling of the findings of fact. It will be observed that there is no request from the Judge therein to any of the attorneys to submit any special finding with respect to Hobbs' credibility and that Judge Igoe expressly stated that the ex parte statement filed in behalf of Hobbs did not concern any of the parties (p. 11, *infra*).

The Supplemental Memorandum merely absolved Hobbs of any professional involvement which might have been created by Judge Igoe's original opinion, affected Hobbs and Hobbs only, and yet the Respondent by misrepresenting the purpose and intent of such Supplemental Memorandum has endeavored to change the entire course of the litigation and has unwittingly misled the Circuit Court of Appeals to take the position that Hobbs "had told the truth", that the evidence of witnesses testifying contrary to Mr. Hobbs was of no probative value and there was therefore no substantial evidence to support the findings of fact.

Respondent is correct in stating that the Circuit Court of Appeals did devote most of its opinion to an exposition of the facts. In that exposition, the Circuit Court of Appeals even came to the conclusion that plaintiff and its attorneys were morally certain of the truth of Thomasma's story, and therefore the falsity of Larson's proofs, and yet the Circuit Court of Appeals disregarded the consequent duty that developed upon plaintiff and its attorneys to inform the authorities of the perjury.

The District Court had seen and heard all of the wit-

nesses and concluded that their conduct had infected plaintiff's cause with unclean hands. The Circuit Court of Appeals and Respondent, after arrogating to themselves the District Court's function of determining credibility, brush off the finding of unclean hands as unsupported by substantial evidence. Even the evidence which the Circuit Court of Appeals accepted supported the finding.

Conclusion.

The Petition brings to this Court a case of public interest raising three questions of public importance. The Petition should be granted.

Respectfully submitted,

WILL FREEMAN,
CASPER W. OOMS,
Attorneys for Petitioners.

Chicago, Illinois,
September 19, 1944.

APPENDIX.

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION AT CHICAGO

Automotive Maintenance Machinery Co., Plaintiff, vs. Precision Instrument Manufacturing Company, Kenneth R. Larson and Snap-On Tools Corporation, Defendants.	Civil Actior No. 4382.

Report of Proceedings had in the above entitled action, before Honorable Michael L. Igoe, Judge, on Friday, June 25, 1943, at the hour of 2:00 o'clock P. M.

Messrs. Davis, Lindsey, Smith & Shonts,
By: Harry W. Lindsey, Jr., Esq.,
Raymond E. Fidler, Esq., and
George N. Hibben, Esq.,
and
Messrs. Fyffe & Clark,
By: A. J. Smith, Esq.,
appeared on behalf of Automotive Maintenance Machinery Co.;

Casper W. Ooms, Esq.,
appeared on behalf of Precision Instrument Manufacturing Company and Kenneth R. Larson;

Messrs. Bair & Freeman,
By: Will Freeman, Esq.,
appeared on behalf of Snap-On Tools Corporation.

The Court: Mr. Lindsey submitted some suggested findings of fact and conclusions of law. You had some here the other day, Mr. Ooms, but you took them away with you.

Mr. Ooms: We had some three weeks ago, your Honor.

The Court: What did you do with them?

Mr. Ooms: We left them here, your Honor.

The Court: We don't have them. I thought you took them back.

Mr. Freeman: No. Your Honor asked for them at that time and said that you would keep them.

The Court: We have here those submitted by Mr. Lindsey's firm.

Mr. Freeman: I have a set here that you can work from until those are found, but those were left with your Honor that afternoon.

The Court: You can give me a copy of that.

I don't want to hear any more about this matter. You have submitted your suggestions and they have submitted their suggestions, and Mr. Hobbs has employed an attorney and he submitted some suggestions.

Mr. Ooms: I know nothing about that.

The Court: I will read the whole thing over and then make up my mind and let you hear from me.

Mr. Ooms: Is there any way that we can get a copy of those Mr. Hobbs served?

The Court: What?

Mr. Ooms: Of those Mr. Hobbs served?

The Court: No, he didn't serve any. He has submitted what he calls a Statement and Analysis of the Record on behalf of M. K. Hobbs, a Witness, prepared by his partner Mr. Haight and former Judge Wilkerson.

Mr. Ooms: I don't think I am interested in that.

The Court: Well, the purport of the statement is that

they do not think that we should be too much interested in Mr. Hobbs, that he was just here as a witness.

Mr. Ooms: When a party, who is not a party to the litigation, raises any issue, I don't see that the defendants are interested in it.

The Court: He doesn't raise any issues.

Mr. Ooms: I don't see that it is anything that I should disturb myself about.

The Court: No, I don't think so. I don't think it is anything that concerns Mr. Lindsey or concerns you.

Mr. Freeman: Have you had a copy of it, Mr. Lindsey?

Mr. Lindsey: No.

Mr. Ooms: Can we transmit that to you, as soon as we can prepare it?

The Court: A copy of the findings?

Mr. Ooms: A copy of the proposed findings of fact and conclusions of law.

The Court: Yes, you can. I wish you would. I thought it was left here. I looked for it, but I could not find it.

Mr. Freeman: We will get another one for you.

The Court: My recollection is that you presented it and Mr. Lindsey made the statement that he did not think that findings of fact and conclusions of law were contemplated and he kind of indicated that we were going to operate on a statement that I had made. At that time, they were handed up to me and as I remember you took them back.

Mr. Ooms: Well, we can have it sent to you this afternoon, your Honor. We will have it re-written and sent here, in exactly the same form it was, with this single change, that we have a plural in connection with their counter-claims, one of which was disposed of by the order the last time we were here, and we will just change that to the singular, and we will serve a copy of Mr. Lindsey immediately.

The Court: Has he served a copy on you of his?

Mr. Ooms: Yes.

Mr. Lindsey: Yes, a week ago.

Mr. Ooms: There is just one other thing: In your decision, your Honor, I think there is an error in transcription, on page 6.

The Court: Perhaps more than one error.

Mr. Ooms: There is a sentence, which begins in the 6th line, reading, "He could not concede that Zimmerman was entitled to priority and at the same time admit that he was guilty of perjury."

The Court: It should be deny that he was guilty of perjury and at the same time concede that Zimmerman was entitled to priority.

Mr. Ooms: I think that if the word not is put after the word time, it states what your Honor said, so that it will read, "He could not concede that Zimmerman was entitled to priority and at the same time not admit that he was guilty of perjury."

The Court: The word not should be in there.

Mr. Ooms: Yes, after the word time.

The Court: "at the same time not admit that he was guilty of perjury."

Mr. Ooms: Yes. May the decision be corrected accordingly, your Honor?

The Court: I will correct it right here.

Mr. Ooms: We will submit our findings then, sometime this afternoon, and send them to your chambers or to the clerk.

The Court: We will be around here for a while today, but I don't know how long.

The Clerk: They can leave them in chambers.

The Court: You can leave them in the Clerk's office with Mr. White's name on it.

Mr. Ooms: Thank you, your Honor.

The Court: I don't know just how long we will be here this afternoon.

Mr. Lindsey: May your Honor please, there was one other matter: At the conclusion of the trial, it was suggested that, in order to save time, we enter into a stipulation with Mr. Ooms and Mr. Freeman with respect to the Larson testimony in the Interference and the exhibits, and we have entered into that stipulation. That was with the approval of your Honor, and I would like to offer the Stipulation in evidence as Plaintiff's Exhibit No. 68, and the Interference exhibits that are referred to and identified by number in the stipulation, if your Honor please.

The Court: If you folks agree to it, I will enter the order.

Mr. Ooms: Yes, Your Honor, we have agreed to it.

The Court: Is that the order there?

Mr. Lindsey: It is just a stipulation.

The Court: All right.

Mr. Lindsey: And I think we can have just a draft order which will suffice.

The Court: And you can present that to the minute clerk's office and we will get it. He will turn it over to me.

CERTIFICATE.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

W. P. BAIR, being first duly sworn, deposes and says that he is an attorney licensed to practice before the Supreme Court of Illinois and the United States Supreme Court; that he was one of the attorneys of record for SNAP-ON TOOLS CORPORATION (petitioner herein) in the cause entitled "In the United States District Court, For the Northern District of Illinois, Eastern Division, Automotive Maintenance Machinery Co., Plaintiff, *vs.* Precision Instrument Manufacturing Company, Kenneth R. Larson and Snap-On Tools Corporation, Defendants, Civil Action No. 4382," and is familiar with the proceedings had and taken in said cause; that the above and foregoing appendix is a true, correct and complete copy of the transcript of a hearing held before Judge Igoe of the United States District Court for the Northern District of Illinois, Eastern Division on June 25, 1943; and that copies thereof were furnished to counsel for all the parties involved in the said cause.

W. P. BAIR.

Subscribed and sworn to before me this 21st day of September, 1944.

DOROTHY COPE,
Notary Public in and for the County of Cook and State of Illinois.

(SEAL)

My commission expires May 26, 1947.

CERTIFICATE OF MAGISTRY.

(Original signed copy has the original certificate of magistry annexed thereto.)